UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)
	) Cause No.
Plaintiff,	) 1:13-CR-150-WTL-TAB
	) Indianapolis, Indiana
vs.	) **February 14, 2014**
	) 3:30 p.m.
GUOQING CAO (1) AND SHUYU LI (2),	)
	)
Defendants.	)

Before the Honorable
WILLIAM T. LAWRENCE

OFFICIAL REPORTER'S TRANSCRIPT OF
DISCOVERY CONFERENCE

Court Reporter: David W. Moxley, RMR, CRR, CMRS
United States District Court
46 East Ohio Street, Room 340
Indianapolis, Indiana 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
TRANSCRIPT CREATED BY COMPUTER-AIDED TRANSCRIPTION

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(PROCEEDINGS)

THE COURT: Mr. Leibman.

MR. LEIBMAN: Your Honor, good afternoon.

THE COURT: Good afternoon to you. What's it like in beautiful downtown Maryland or wherever?

MR. LEIBMAN: It's actually Princeton. It's better. It's better. Yesterday was our awful weather day. And I understand you now have an awful weather day in Indianapolis.

THE COURT: Yeah, we do. And I think a dusting was predicted, and I think we've got more than that.

MR. HENSEL: We did, yeah.

THE COURT: All right. I have the usual suspects around the table, and you are obviously on speakerphone, and the matter is being recorded -- reported rather.

MR. LEIBMAN: Thank you.

THE COURT: Okay. Let's -- I don't know. Do you have an agenda?

MS. RIDGEWAY: I would suggest, Your Honor, if I might, the parties have talked in advance of the hearing. At least I had a conversation with Mr. Newman and Mr. Hensel on behalf of Mr. Cao. And --

THE COURT: Mr. Leibman, can you hear all right?

MR. LEIBMAN: It's a bit faint, but I can hear Ms. Ridgeway.

THE COURT: Okay. Speak up if it gets too faint.

MS. RIDGEWAY: What I would suggest doing, in anticipation of setting specific dates or deadlines, is letting the Court know about the conversations that we've had. And, basically, I asked the defense if we believed that the May trial date was a realistic May trial date, because, for the obvious reasons, some of the dates that the defense would suggest, for example, have already passed.

THE COURT: Yeah.

MS. RIDGEWAY: So -- and I believe -- I don't know what Mr. Li thinks by and through Mr. Newman, but I believe that Mr. Cao and the government at least would recommend to the Court to vacate that May trial date, potentially schedule that date for a pretrial conference, or another pretrial conference around that time, and at that point decide where the parties are and then schedule a realistic trial date.

We would then be able to extend the discovery based on, frankly, the necessity for the government to review and categorize all of this material and then get it to them, have the defense have enough time to review it, prepare, and then set a realistic trial date.

THE COURT: Mr. Newman, do you have authority to agree to that or what -- do you have an inclination?

MR. HENSEL: If I could, just to be clear, I'm not sure I agree with that completely, but go ahead, Scott. I can speak later.

MR. NEWMAN: Mr. Hensel may not agree with the characterization, maybe, but I think we're both on the same page, which is that while we acknowledge, realistically, that the trial date in May is looking unrealistic for various reasons, we don't know how to react to it because we don't know when we will be charged, what we will be charged with, or what the nature of the discovery is.

As the Court will recall, at our last status conference, we were told that counsel for the government expected to submit the matter for superseding indictment. And we were told at that time that the last session that they would have would be in about the second week of February, and that would be maybe about the 10th, if I recall correctly. And that would be the last opportunity the government would have to supersede with the current Grand Jury that had considered the matter previously.

That has not occurred. And as I inquired of Ms. Ridgeway about that, she indicates that she may have been mistaken or they may have extended it to the extent that they now will go into March. And she was considering submitting the matter in March for superseding indictment. She cannot tell us for certain at this point what date that would be, what would be submitted to them, whether the trade secret counts would be a part of what was submitted to them or not.

And, obviously, that's been our focus all along in the defense preparations. We don't know whether those counts will stay or go. Some of those counts may go. Other counts may be added. She's talked about other charging theories. And we can surmise what some of those may be, but we really don't know. And she's not able to tell us any details, to this point, when this will happen and what the charges will consist of.

Therefore, we do not feel that we can join in a continuance motion, although we would have to realistically state, given the state of the record, we don't see how we can be ready and be effective in May.

THE COURT: I do agree with Ms. Ridgeway, that I think the 75 days prior to the final pretrial is already over, too. So is Mr. Newman correct in regards to the status of a superseding indictment, that you intend to do it; it may be done in March, if it is?

MS. RIDGEWAY: Yes, Your Honor. We hope to have that superseding brought before the Grand Jury this month, but we continue to, frankly, receive information that changes things in terms of how it sheds light on the case, and so we hope to have the entire review done before we make final decisions.

So, for example, much of this evidence is ESI, electronically stored information, and some of the information has not yet been reviewed, frankly, up until the date that we charged originally.

We have now gone back and are continuing to go back and look at all the mass of evidence, and we're learning more facts, and so we need to supersede. We hope to do that next month. Of course, we would never be able to tell the defendants when that would be, although we hope to do that next month. And certainly, in thinking about that, I would have no problem extending the trial date beyond May to give them appropriate opportunity to prepare their defense.

I don't think I set a specific date previously about when we would hope to supersede. We would never be able to reveal that date to a defendant.

MR. HENSEL: And, Judge, if I could, I don't want to repeat Scott's, but it is hard. Just imagine sitting down with my client and saying, you know, "Here's what you're charged with and here's what the discovery is. I just don't know." And I can't say, "Would you agree to a continuance?" while he's sitting in the VOA pretrial, which, you know, is another matter, I think, if we go to delay the trial further.

And if the charging theory changes and it's not what we saw the first time when the Court made its decision about release or detention, you know, I think it could change that calculus, as well. It would be a lot easier to have delays so we could all prepare for trial and understand what the charges are if, you know, the clients were more free; more free, one, to work with their counsel.

This case is huge. I've tried to cart some of the materials. I can't take them all with me over to the VOA, but there's no room. There's no -- I get a little office, it's a different office every time. The people at VOA are great, they are wonderful to deal with, but they are just limited in the facility. And I will get like a little office with a single desk, and I can't lay everything out. But it takes time to lay it out, put it back in a box, cart it back.

There is one big multipurpose room that's available, but it has four doors that lead into it, and we get interrupted two or three times an hour; people coming in to do something, "No, no, sorry," back out. And the last time I was there, I actually had to leave early because they had a function scheduled that I didn't know about.

It's impossible to prepare. This is a big science case, our clients are scientists. They need to educate their lawyers, and I can't do that at the VOA. I've actually had to bring a heater into a room at the VOA because it's cold in some of the rooms. It's just -- it's really hard.

THE COURT: Well, clearly, we're not going to take that issue up now. Let's -- all right. Let's presume that the indictments are superseded within 30 days. I would like to keep the final pretrial for April the 17th on as previously scheduled. We will call it a pretrial. Probably we will not be calling it any longer a final pretrial. Let's keep that date.

Let's also keep the 19th of May open on your calendars as it will be on our calendars, and we will get together, probably. At least I want to be able to hold that date open if we indeed do need to get together and it is not the trial date, which it sounds like it will not be.

All right. Well, that's kind of a hedge, but I hear you. I think we're all -- we understand. If the charges are reduced in any way, I may indeed take up an issue of release or detention again if brought. We'll just have to see how that shakes out.

MS. RIDGEWAY: And I would say, just so the parties are aware, it would not be a lesser felony. If anything, it would be a much more significant felony charge brought.

THE COURT: Well, that's probably a discussion for another day. All right, let's get into some of the discovery issues. And I don't know, because I got the feeling that the 11,000 pages that you turned over had not been turned over or at least not reviewed when some of these issues surfaced.

MS. RIDGEWAY: And I would just say to that point, Your Honor, I think it was just by happenstance that Mr. Leibman authored that letter to you and sent it through Mrs. Ong after the government had made available those 11,000, 10,000-some pages to the defendants. They had not received it in terms of physically having it in their possession, but we had sent the e-mail out that said it was available. Thereafter, the government and the Court received the letter from Mr. Leibman. So, I think that was just crossing winds.

But we have given the defendants the -- both defendants in excess of 10,000 pages of discovery. We have another approximately 400, 300-something pages of discovery here, which would meet many of the things that we had on our proposed case management order.

Specifically on paragraph 1, the defendants' own criminal history, the human resources files for each defendant, travel records for each defendant. The audio recording of the FBI interview of each defendant was given prior to that date. We have now ready for them search warrant application affidavit and orders. We have been given -- giving them the training material and any other statements made by the defendants that fall within the scope of Rule 16.

We have not been able to receive from Lilly the privilege log. We did engage in conversation with the defendants about the specific fields that that privilege log would contain. So, after a bit of give and take, we agreed on approximately 23 fields that would be populated with information to identify what the privileged material is. We also made clear that in certain circumstances, those fields cannot be populated because, frankly, the information is not readily accessible.

So we will give to the defendants -- as soon as the government gets that privilege log, we will give that to the defendants. We cannot give them the ESI without that privilege log, so what we have talked with Lilly about is, for example, on page 2 on my proposed case management order, the forensic image of the defendants' hard drives, this is actually going to be -- we would ask the Court to allow us time to review the hard -- continue to review that hard drive, and we would specifically request for Cao's hard drive; if we could give that to the defendant, together with the privilege log, on or about February 21st.

Li's is much more significant in terms of size and how he organized his hard drive. So what we would propose is giving the Defendant Li his hard drive, together with the privilege log, on or about March the 7th with one caveat. Li organized his hard drive so that he also archived on a quarterly basis all of his e-mails, so there is significant e-mail evidence also on his hard drive. We can only go through -- let me see how big that number is. Li's hard drive is about 250 gigabytes' worth of data. And, of course, Lilly has to review all of that for privilege. Then, in addition to that, there is this separate archival of e-mails.

So what we would ask the Court is to allow us to have until March 7th to give Li his hard drive, together with the privilege log, with the exception of that e-mail information. Lilly will need more time to review those e-mails for potential privilege.

And, frankly, we would like to obviate that need for these many reasons, but most importantly, these e-mails go back all the way to 2006, and so it doesn't make sense, in terms of efficiency and fairness, frankly, to the company for them to have to review e-mails that have been archived back to 2006 for privilege. There will undoubtedly be privileged material in that, but to subject the company to have to do that just seems unfair. So we would be asking for that.

And then, with regard to the forensic image of the electronic evidence produced by the Internet service providers, it's coming in a rolling production to Lilly to review for privilege. And then, of course, we would have to then categorize into restricted use and also sensitive material. So that material, by itself, is three gigabytes' worth of data.

We've also experienced technical difficulties because much of it has Chinese characters. So, in order for us to upload the e-mails into our document review program, we had to outsource it to Main Justice, because we did not, within the U.S. Attorney's Office here in Indianapolis, have the capability of maintaining those Chinese characters. So we outsourced it; then we had to bring it back in. And now we're having to give it over to Lilly to do their privilege review and do the markings for restricted use and sensitive material.

So what we would ask is to do it in a rolling production manner. And this is kind of the theme behind this whole case management order. If we wanted to just give them a great big dump, it would be far away. I mean, the time frame would be far distant. What we hope to do is continue to do our best job and give it to them in a rolling production.

So for the Cao, gcao99@gmail.com, e-mail evidence, what we would ask is the Court allow us to have until February 21st, which is the same day that we would give that Cao's hard drive together with the privilege log.

The rest of the e-mail accounts we are just getting back from Main Justice, so we have to do our internal processing; then give it to Lilly. So we frankly don't have a specific date. I don't even know how large those files are. Total, it's about three gigs, but I don't know how many broken down.

So we would ask, for that particular type of evidence, that we would come back maybe on April 17th or May 19th, whichever date the Court would feel is more appropriate, and give a status; or I could, of course, file a status report based on how we continue to progress with that. We're happy to do what we can, but I'm only one person, and we can only do as much as we can.

THE COURT: Scott?

MR. NEWMAN: Well, I don't have any problem with the March 7th deadline for getting that hard drive, I mean, but I do have some difficulty with understanding some of the commentary that goes with it. I understand it's going to take some time, but the government has had a fair amount of time to prepare this stuff. And it wouldn't trouble me so much if I weren't hearing counsel say that as they review this material, they are learning the case and are wanting to supersede or change theories or ratchet up the seriousness of the felonies that they want to charge.

You know, my guy is sitting in VOA trying to figure out what he's charged with, and the government is sort of learning their case and reviewing it. The general principle of that, I do disagree with strenuously; but for this purpose, I guess March 7th, if that's when we're going to have to wait to get our own hard drive looked at, I'm fine with that.

I did not understand the portion in which she said that they don't want to review for privilege going back to '06. I'm not clear on what you are seeking to -- for them to do with that, to abbreviate that. Can you clarify that?

MS. RIDGEWAY: Get a time frame, a relevant time frame. So we would review those archived e-mails back to a certain date, but not all the way back to 2006.

And if I might just respond to that first point, as with any electronically stored information that is hard drive related, we can only go through and do basic word searches to try and pull out the relevant evidence. And I would be shocked in any criminal case if an investigator pored through every piece of data that is on a hard drive. So we did our original word search, and now that we have to review for privilege, now we have to go back and do a more in-depth review. So that's the distinction.

MR. LEIBMAN: Can you hear us?

THE COURT: Pardon me?

MR. LEIBMAN: I lost audio. Yeah, I lost audio.

MR. HENSEL: Can you hear us now? Alain, are you there?

MR. LEIBMAN: Your Honor, I'm sorry. Can you hear us in New Jersey?

THE COURT: Yes, we can. Can you hear us?

MR. LEIBMAN: I'm not sure, frankly, what to do at this point.

THE COURT: Why don't you hang up and try to call again?

MR. LEIBMAN: Sure. Why don't you -- I'll disconnect this call. Why don't you call me back? And I'll go through the same process. Okay.

THE COURT: Okay.

MR. HENSEL: He's talking to another -- he's talking to Matt, not to you, Judge.

Here's -- it's really hard. I don't want to sit here -- I can't today sit here and agree to certain dates. And I'm not used to this sort of laundry list and saying, this by this date. I'm happy to get a list, an inventory of what you give us, but I don't want to say by -- and we've talked about this, yes, by February 21st I get this and on this date I get this and on this date I get that, that somehow I'm agreeing that you're discharging --

(Off the record.)

THE COURT: Hello?

MR. LEIBMAN: Yes. I'm sorry, Judge. We lost audio here.

THE COURT: Okay. Are you hearing me fine now?

MR. LEIBMAN: Yes, I am, Judge. I heard everything up to Ms. Ridgeway saying something about misdemeanor plea and then the audio --

MS. RIDGEWAY: I don't think anyone has ever heard Ms. Ridgeway say misdemeanor plea.

THE COURT: All right. David, why don't you take up where you left off.

MR. HENSEL: Right. The point I was just trying to make is that I'm unfamiliar with this sort of schedule of discovery. What I'm used to is, we have a trial date, we work back from that and have -- discovery should be done by this date. In what order you want to give it to me, I understand it's difficult. Some things are.

But what I don't want to do is sit here today and say, February 21, 2014, is a good day to give me this and have me say that I agree. You're discharging whatever duties you have to get me discovery in a timely fashion. You know, get it to me when you can. I'm happy to have an inventory with it.

But I'm not sure -- I disagree with several things. I disagree with the idea that we cut off review of e-mails that could contain *Brady* information back to a certain date. A lot of these compounds, at least today, the trade secrets we're dealing with, were being looked at and investigated by Lilly back in that timeframe. And if there's an e-mail showing it being disclosed or treated differently at that timeframe, that's really relevant to my case and my client. So I can't agree sitting here today, without knowing anything, to an idea that we'll cut it off at a certain date before then.

THE COURT: Well, did Cao's go back to '06, or just Li's?

MR. NEWMAN: They go back to '06. That's the allegations.

MS. RIDGEWAY: Just -- on the hard drive, just Li's.

MR. HENSEL: And that's another problem. I mean, no one's hard drive -- my hard drive doesn't contain my e-mails.

MS. RIDGEWAY: Except that Li specifically tweaked his hard drive so that it would, on its own, archive all of his e-mails.

MR. HENSEL: Okay. And you're saying it goes back to when?

MS. RIDGEWAY: 2006.

MR. HENSEL: Cao's does?

MS. RIDGEWAY: Li's.

MR. HENSEL: Li's.

THE COURT: No. I think she --

MR. HENSEL: My client --

MS. RIDGEWAY: Cao did not archive his e-mails.

MR. HENSEL: So my hard drive, the hard drive for my client, is not going to contain his e-mails, because they're on a server, is how most companies work, that get sent someplace else in a room, in a closet off-site, and are archived according to sort of document retention policy by different companies. So that won't be on my guy's hard drive. So we have to retrieve those e-mails some other way, right?

MS. RIDGEWAY: So Cao's hard drive will have some of his e-mails, but it was not an automatic process like what Li set up on his hard drive.

MR. HENSEL: Right. So this is why I think, especially in this setting, it's just really hard. It's impossible for me to say, yes, yes, yes to this date by this date, by this date. I don't know what it is. I don't know what they have. I don't know what the charges are going to be, so it's really hard to make any evaluation.

What I do agree with, and I think we would -- is that this is a complex case. We don't know what the charges are going to be. We ought to have dates in the future that we get back together on, and get us discovery as fast as you can.

THE COURT: Yeah. I really don't have a problem with what Ms. Ridgeway is suggesting, because, again, we're all kind of buying into a pig in a poke a little bit, because we don't know what the ultimate charges are. But I don't think by completing at least the initial stage by March the 7th, February the 21st, I don't think that hurts anybody.

MR. NEWMAN: One thing I don't have a sense of, Judge, if I may, and I think we're coming closer to some consensus here, but I don't have a sense of what proportion of the total discovery we have that has been produced. I asked Ms. Ridgeway that question, and what I got from it was that, although we have some 11,000 documents, that does not represent the lion's share, it does not represent the lion's share, or even the majority of the discovery that she anticipates in this case.

I would also point out that if -- it would appear that some of the trade secret counts either have gone away in the first superseder or are in the process of going away, as well as some others, through discussions that we've had. Whether they all go away or not will impact the way discovery is done, because as the Court knows, the elements of the trade secret violation contain, really require what would normally be extraneous information be provided, such as, how did the company protect this piece of information versus other pieces of information?

You know, whether the defendant had the intent to injure the corporation, a very broad inquiry indeed. That requires us to take a broader scan of the documents relevant to that defendant, and it might be the case of a simple allegation of thievery, a mail fraud type. So, not knowing what the menu is going to look like and, in the meantime, of course, being in custody puts us in a position where we just don't know how to react to these kinds of propositions.

THE COURT: All right.

MR. NEWMAN: I would like to know how much total discovery we would be talking about. That would be helpful, as well.

THE COURT: And you're probably not in a position to answer that, are you?

MS. RIDGEWAY: Well, what I would say, when I responded to Mr. Newman's off-the-record inquiry when we were just having our conversation, the ESI evidence, when you talk about Li's hard drive, has 250 gigabytes of data. That far exceeds any documents, hard-copy documents, far exceeds. So I don't know how you would, you know, I guess, characterize it, but I would say that the lion's share is still to come, because you don't have any ESI yet. So I don't know.

MR. NEWMAN: I'm not talking about by weight. I'm talking about by information contained. That's a lot of gigabytes.

MS. RIDGEWAY: Well --

THE COURT: I think we go with the schedule that Cynthia has suggested as to those categories of discovery materials.

MS. RIDGEWAY: Thank you, Your Honor.

THE COURT: Just to get -- again, we'll get this moving. It sounds like it's going to happen at least by the time that Mr. Li's initial load -- not initial load, but at least by the May 7th discovery and shortly thereafter -- I said May. March 7th. You will maybe have already superseded or at least be in a better position, and we can meet again shortly after that. I think we probably ought to meet at the point of when the indictments are superseded.

MS. RIDGEWAY: Thank you, Your Honor.

THE COURT: Shortly after that. Because then the target, that clearly now is moving, will be stationary, and we can then talk further. But, in the meantime, we've generated substantial amounts of discovery that it's going to take you awhile to digest anyway.

MR. HENSEL: Right.

THE COURT: But I know it's difficult for defense counsel at this point to hone in on different types of discovery, because they don't know what the charges are. So I can absolutely appreciate the defendants' plight here. So let's go ahead with the dates as suggested by the government.

MR. HENSEL: Can I just -- those are -- the ones I've heard are February 21st for Cao's hard drive and March 7th for Li's?

MS. RIDGEWAY: Together with the privilege log.

MR. HENSEL: Okay.

MR. NEWMAN: But we still have this other point as to ours, which is, March 7th is a realistic date for you to provide something, but you're talking about not --

MS. RIDGEWAY: Carving out.

MR. NEWMAN: Carving out. So can you be more specific about what we would expect by March 7th and what we could not expect?

MS. RIDGEWAY: What we would not be able to review by March 7th are those archived e-mails that go back to 2006.

MR. NEWMAN: Okay.

MR. HENSEL: Which is true for Cao, as well?

MS. RIDGEWAY: Cao do not have archived e-mails on his computer.

MR. HENSEL: Oh, no, no; on his hard drive. But I want to be clear. I want his e-mails that are on the server.

MS. RIDGEWAY: Well, I think that's for another day. That's not what we're talking about today.

MR. NEWMAN: Our e-mails are on the server, as well, as well as having been archived by us. I would assume we have it in both places.

MR. HENSEL: This is sort of the point, Judge. By agreeing to it, I don't want to say I'm giving up on some other piece of discovery.

THE COURT: And you're not.

MR. HENSEL: Okay.

THE COURT: I think this is going to be a weekly meeting.

MS. RIDGEWAY: It's going to be fine.

MR. HENSEL: And with that -- right. For it to work under the protocol, with the hard drive comes the privilege log that we give to the forensic screener?

MS. RIDGEWAY: Correct.

THE COURT: Okay. I've got some other categories of items that have been suggested. Documents that agents relied on when interviewing the defendants; where, if anywhere, are we with that?

MS. RIDGEWAY: And that is all on this discovery I have here for them today.

THE COURT: Okay. *Brady* materials were at issue. Have you made an attempt to at least provide if there are any discovery -- that you have discovered to date?

MS. RIDGEWAY: Yes, Your Honor. We understand our *Brady* obligations well and will meet them. And we have given *Brady* material and more *Brady* material is found within the ESI. We have not given *Jencks*, so we'll just be very clear, that is a distinct category. But we --

MR. HENSEL: So if I'm clear, what you're doing is, you're saying, "Here's this mass of stuff. In there is *Brady*. Go find it."

MS. RIDGEWAY: Well, do you think I should have to identify it for you?

MR. HENSEL: I think at some point. You just can't point to a roomful of documents and say, "Go fish." I think in a normal case, maybe not. But at some point I think there's an obligation on the government, when they find *Brady* material, to designate it. I just don't think you can dump 250 gigabytes and say, "It's in there."

MS. RIDGEWAY: I've never had to do that before in a criminal case.

MR. HENSEL: Well, I think that's a matter for another day.

THE COURT: That's going to be interesting. All right.

MS. RIDGEWAY: That would require me to go through every single thing that I've given you, personally. And there is -- that is -- we're talking -- I would be 60 years old before that would be done. I would have to personally go through every piece of evidence, everything that we're giving you, including the 250 gigabyte data.

THE COURT: All right. Let's call it off, because I do think that may be an interesting topic saved for another day. Okay. Scientific tests --

MS. RIDGEWAY: That would -- sorry.

THE COURT: Go ahead.

MS. RIDGEWAY: We have some reports that we could provide, and we would suggest providing those by February 21st. There will be, though -- I wouldn't want the Court to think that we were representing that that would be the entirety of it, because it's not. Frankly, FBI is continuing to do their forensic analysis on the ESI, and we would gather that information and tender it as we had it, but we would give to the defendants whatever reports we have to date by February 21st.

MR. NEWMAN: Forensic and scientific --

THE COURT: Okay. As long as you're not cherrypicking.

MS. RIDGEWAY: No, I'm not cherrypicking.

THE COURT: In other words, if -- you know, the obligation should go forth that you're to provide all the tests currently in your possession.

MS. RIDGEWAY: Okay.

THE COURT: That type of thing.

MR. HENSEL: And what brought this --

MS. RIDGEWAY: The test reports? All the test reports?

THE COURT: Yes.

MR. HENSEL: Right. I mean, one example is, in the interrogations by the agents, they reference that Lilly has done an analysis and can tell when one of the defendants downloaded something, and what it was, and how big it was, and where it is. Is that test in this thing today?

MS. RIDGEWAY: No, it's not in this material today.

MR. HENSEL: Okay.

MS. RIDGEWAY: I believe that you're talking about -- I think I know what you're talking about. And if that is the case, then, yes, that is one of the reports that we'll be giving you on February 21st.

MR. HENSEL: Okay.

MS. RIDGEWAY: But --

MR. HENSEL: It's whatever the agents claim they did, that the FBI did, and Lilly did in the interrogations.

MS. RIDGEWAY: Okay. We will give to the defendants whatever reports are required by Rule 16 that we have in our possession on February 21st. That is not to say that that is the end of our reporting, because we will continue to do our processing thereafter. We would also, of course, continue to gather expert witnesses thereafter. And those, we can't produce something we don't have yet.

THE COURT: All right. Bill of particulars regarding the chart that defendants believe that they received might have some inaccuracies or whatever; is that a situation that has been or will be updated, or do you acknowledge that there were some issues?

MS. RIDGEWAY: What I talked to, at least -- I don't remember who I talked to.

MR. HENSEL: To me.

MS. RIDGEWAY: -- to David about, Mr. Hensel about, excuse me, is that when we supersede, if we need to redo a new chart, we will. But at this point, knowing both -- all parties know that the government's plan is to supersede, that chart is moot.

THE COURT: The existing chart is moot?

MS. RIDGEWAY: Correct.

THE COURT: So an additional chart --

MS. RIDGEWAY: If it's necessary, we would give one when we superseded.

MR. NEWMAN: I don't agree that it's moot. I would agree that it's been -- it may -- it will have been superseded by --

MS. RIDGEWAY: Well, when you supersede an indictment, the original indictment is moot.

MR. NEWMAN: Well, okay. I think it has value to know what the jury was presented with previously. And I'm not going to stipulate it's moot.

MR. HENSEL: I mean, that is true, is that we have a superseding indictment right now, and what we asked for was a bill -- you know, a chart of those trade secrets outlined in the superseding indictment. And on its face, the chart we have doesn't match up with what's in the superseding indictment. They just don't.

MS. RIDGEWAY: Okay.

MR. HENSEL: So --

THE COURT: Okay. I just simply say -- and, again, if -- I don't think we should revisit the mid-January chart. I think we need to move forward to the new chart based upon what we anticipate to be a superseding indictment. And if there is, then that will be provided. If there is no superseding indictment, we'll get together. And we need to probably crunch the mid-January chart somehow.

MS. RIDGEWAY: Thank you, Your Honor.

MR. NEWMAN: I guess all I'm saying is I'm reserving the possibility of a relevancy determination. I'm not stipulating that it is not relevant, the previous chart. It could become relevant.

THE COURT: It may become relevant, right.

MS. RIDGEWAY: But certainly not admissible. That's not something --

MR. HENSEL: I'm certainly not conceding that at all, no.

MS. RIDGEWAY: Well, the whole point of this protective order is to designate certain things so that we can continue on with the discovery process. And one of the points was that what the government designated was specific restricted use or sensitive material would not be submitted.

MR. HENSEL: Judge, we'll insist upon a formal bill of particulars, then, if this is the way it's going to be treated, that I can give you this, mark it confidential, but it can't come in. You know, I want something that holds the government to what its indictment claims it's charging.

MS. RIDGEWAY: In any circumstance, if a superseding indictment is brought, the original indictment is gone as if it disappeared. Poof, it's gone. For example, at the trial --

MR. NEWMAN: As a charging document, certainly.

MS. RIDGEWAY: For the trial that just occurred, they were on their fourth superseding indictment. What was previously charged is not relevant, it's no longer relevant.

MR. HENSEL: This just gives a whole 'nother meaning to a moving target. This is -- it's just really hard.

THE COURT: Well, again, the fact of a superseding indictment or the fact that there will not be a superseding indictment may rule the day on that issue and maybe some others. So, you know, I hate to keep rolling the ball down the hill, but let's hold that. I think it's a valid issue that needs to be resolved, but let's save it and see what happens.

MS. RIDGEWAY: Thank you, Your Honor.

THE COURT: What else have I got? That is now moot.

Okay, I had issues regarding -- on what you had presented, paragraphs 1, 2, 3, 7, and 9. And I think we've already talked about some of them.

MS. RIDGEWAY: With regard to the expert witnesses and final transcripts, we agree. The parties ended up agreeing, I think, on the date for the final transcript to be provided; not a specific date on the calendar year, but a time before the trial date.

THE COURT: Working back?

MS. RIDGEWAY: Working backward. I hope that we did with regard to expert witnesses, as well. What the defendants propose is that their reciprocal discovery obligations would not begin until after -- at the close of the government's discovery. And, certainly, that would be unfair. They have asked us for discovery. The rules specifically say that when they ask us, we can respond in kind, which we have done. So reciprocal discovery should be forthcoming. That's our position.

THE COURT: Okay. I think the rule says the government provides and then the defendants comply.

MR. HENSEL: Right.

MS. RIDGEWAY: There's no chronological order to that, not in the rules. There's no chronological order. It simply says if the defendants make the request, then the government should tender. And, reciprocally, the defendants should also tender. There's no specific chronology in that.

MR. HENSEL: Every case I've been in, the pattern has gone government first --

MS. RIDGEWAY: Every case I've been in, we've never gotten --

MR. HENSEL: Right.

MS. RIDGEWAY: -- reciprocal discovery, so it doesn't matter. But there's no timing, chronologically, in the rules.

MR. LEIBMAN: Your Honor, this is Alain Leibman. May I interject?

THE COURT: Absolutely.

MR. LEIBMAN: I have the benefit of being at my desk, so the rule is actually right here. Rule 16(b), which governs our disclosure, 16(b)(1)(A), the opening paragraph, says that, "If a defendant requests disclosure," this is now on experts, "and the government complies, then the defendant must permit" -- I'm sorry, not experts. It's --

THE COURT: No. You're talking about documents.

MR. LEIBMAN: "Documents and Objects," "Documents and Objects," which is the biggest category here.

THE COURT: I'm looking at the same thing. Yeah.

MR. LEIBMAN: I'm sorry.

THE COURT: I'm looking at the same thing. And I think I even --

MR. LEIBMAN: It clearly has a sequential feature to it.

THE COURT: You know --

MS. RIDGEWAY: I disagree with that characterization.

THE COURT: You know, I don't know, because 99 percent of the cases, there is no -- there is nothing.

MS. RIDGEWAY: Right.

THE COURT: So I don't know if I've ever really sat down and thought whether that is a -- when it says "then," whether that designates sequential discovery or not. It would -- when I read through it the first time, I said, well, yeah, I mean, but I don't know that. I have not had that issue. So maybe that's something I will look, also, I will look at with a little more critical eye.

MS. RIDGEWAY: And, of course, we would accept whatever ruling the Court would make on this issue, but if the goal, as the defendants allege today, is to move the case along, even though they have been both released, I would say that the equity dictates. And equity says we are giving to you, in fact we have now given to you -- as of today, we will give you close to 12,000 pages' worth of discovery. We have to still work through this ESI.

So if the objective for you is to speed the case along, as you alleged originally with the Court when you talked about custody status, then I would suggest that you give us discovery now to move the ball forward.

THE COURT: Okay. But I don't think it's going to be -- I don't think they need to give it to you now. I mean, I think there's too many balls in the air right now. I mean, I think we can come back and talk about that when we've got a target that we all agree, ah, well, here we are. They don't -- I mean, they have no idea.

MR. HENSEL: Even the chart I have is no good, so I can't begin to offer you anything.

THE COURT: I agree. I think we defer that, clearly, but it will be an issue -- I'll probably just do it for an exercise to see whether "then" means sequentially or not.

MR. NEWMAN: You do have lifetime tenure, Judge. I just want to point that out to you.

THE COURT: Yeah.

MS. RIDGEWAY: I think I might be able to outlast him. I'll be here when you --

MR. NEWMAN: When you're 60, maybe you will have the wisdom to deal with this case properly.

THE COURT: All right. What else can I do? That kind of exhausts my list.

MR. HENSEL: Judge, are you contemplating entering a discovery order along the lines as the one that the government tendered? Because --

THE COURT: With the additions of the things that I think we've kind of worked towards. Maybe Cynthia can generate that and circulate that.

MR. HENSEL: Yeah, let's do that, because I want to think about, for example, number 7, getting experts' transcripts 30 days before trial. This all about science, you know, and I'm going to have to find a counter-expert after I -- you know, I need to get that way before 30 days before the trial.

MS. RIDGEWAY: And, really, this was based on when the defendants were unwilling to move off that May trial date. I mean, I can only do so much before May. And so when we were looking at a firm and hard May trial date, mid-April was the soonest that I could get to you potential expert witnesses. So, now that we have potentially moved off that date, I understand exactly what you're saying.

MR. HENSEL: Right.

MS. RIDGEWAY: It's much more reasonable.

MR. HENSEL: If you just circulate something around, we'll take a look at it.

MS. RIDGEWAY: Okay.

MR. NEWMAN: I believe that we can arrive at a management order that makes sense for the new set of dates, but I would say that we need to get back to, I think, the dual set of issues that will arise: The first issues being the discovery issues, and then a second wave of issues being a motions practice surrounding the merits, dispositive motions, those sorts of things.

And I think it's helpful, it's a paradigm that the judge gave us last time as we're exiting, and if we could sort of do it in this double, you know, this dual schedule, I think that would work well. We have some serious discovery issues that we'll need to slog through, and we're doing that. And then we'll have the substantive dispositive kinds of issues. That would be typical in a case like this.

THE COURT: All right. So I want to hold to those two dates that we have now. That would be the April the 17th and -- let's see -- April the 17th date and the May 19th date, as far as your calendars are concerned. I would also be amenable to getting together shortly after there's a superseding indictment.

MS. RIDGEWAY: Thank you, Your Honor.

THE COURT: And I think that -- you know, I think if we can kind of get together on at least some regular basis and monitor this, rather than wait until the last minute, and probably when the indictment is superseding -- superseded, assuming it is, I think then we can get a trial date.

MS. RIDGEWAY: Thank you, Your Honor.

THE COURT: Okay. Mr. Leibman, anything for the good of the cause?

MR. LEIBMAN: No, Your Honor. Thank you so much for the opportunity to phone in, though, to participate.

THE COURT: Absolutely.

David?

MR. HENSEL: No, Judge.

THE COURT: Young Mr. Newman?

MR. NEWMAN: I don't know where he is, but we have nothing further.

THE COURT: Bill, anything you want to say for the good of the cause?

MR. BARKIMER: No, Your Honor.

THE COURT: Just so you can get on the box score. Come on, say something.

MR. BARKIMER: No, thank you, Your Honor.

THE COURT: All right. You all, have a great day.

MS. RIDGEWAY: Thank you, Your Honor.

MR. NEWMAN: Thank you, Your Honor.

MR. LEIBMAN: Thank you, Your Honor.

(Proceedings adjourned at 4:14 p.m.)

CERTIFICATE OF COURT REPORTER

I, David W. Moxley, hereby certify that the foregoing is a true and correct transcript from reported proceedings in the above-entitled matter.

/S/ David W. Moxley   February 24, 2014

DAVID W. MOXLEY, RMR/CRR/CMRS
Official Court Reporter
Southern District of Indiana
Indianapolis Division